

(16,708.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 188.

THE SECURITY TRUST COMPANY, AS ASSIGNEE OF THE
D. D. MERRILL COMPANY, PLAINTIFF IN ERROR.

vs.

FRANK H. DODD, BLEECKER VAN WAGENEN, AND
EDWARD H. DODD, COPARTNERS AS DODD, MEAD &
COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

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1 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

SECURITY TRUST COMPANY, as Assignee
of the D. D. Merrill Company, Plaintiff
in Error,

VS.

FRANK H. DODD, BLEECKER VAN WAG-
GENEN, and Edward H. Dodd, Co-
partners as Dodd, Mead and Com-
pany, Defendants in Error.

No. 916. In Error to the
Circuit Court of the
United States for the
District of Minnesota.

The United States circuit court of appeals for the eighth circuit, sitting in the city of St. Paul, Minnesota, on the eleventh day of October, 1897, hereby certifies that from the record on file in said court in case No. 916, entitled Security Trust Company, as assignee of the D. D. Merrill Company, plaintiff in error, against Frank H. Dodd, Bleecker Van Waggenen and Edward H. Dodd, copartners under the firm name of Dodd, Mead and Company, defendants in error; which said cause is now pending and undetermined in said court of appeals on a writ of error duly issued to the circuit court of the United States for the district of Minnesota, the following facts appear, to wit:

That a suit was brought by The Security Trust Company, the above-named plaintiff in error, against Frank H. Dodd, Bleecker Van Waggenen, and Robert H. Dodd, the above-named defendants in error, in the district court for the second judicial district of the State of Minnesota, to recover the value of certain personal property, consisting of sixty thousand stereotyped and electrotyped plates for making and printing books, alleged to be of the value of ten thousand dollars, upon the ground that the defendants had unlawfully converted said personal property to their own use; which said suit was duly removed from said State court to the circuit court of the United States for the district of Minnesota and was there tried; that upon the trial of said cause the facts on which the plaintiff's right to recover depended were as follows, to wit:

2 That on and prior to the 23rd day of September, 1893, the D. D. Merrill Company was a corporation duly organized and existing under the laws of the State of Minnesota and carrying on a mercantile business at the city of St. Paul, in said State, and that on and prior to said last-mentioned day the said D. D. Merrill Company on account of misfortunes in business had become and was insolvent and was unable to pay its debts in the usual course of business, and thereupon, on said 23rd day of September, 1893, the said D. D. Merrill Company, under and pursuant to the provisions of chapter 148 of the Laws of 1881 of the State of Minnesota and the several acts amendatory thereof, duly made and executed and delivered to The Security Trust Company, the plaintiff in error herein, a certain deed of assignment hereinafter described; which said assignment was on said day filed in the office of the clerk of the district

court of the State of Minnesota in and for the county of Ramsey, in said State; that the said Security Trust Company duly accepted the trust imposed upon it by virtue of said deed of assignment, and thereupon duly qualified as such assignee and entered upon the discharge of its duties as such, and thereupon took possession of such part of the property of said insolvent corporation as was to be found in the State of Minnesota, and afterwards sold and disposed of the same for the benefit of the creditors of said insolvent corporation; that the defendants in error above named had full knowledge of the execution and filing of such assignment prior to the 8th day of March, 1894.

That on the 23rd day of September, 1893, the said D. D. Merrill Company was justly and truly indebted to the defendants above named, to wit, Frank H. Dodd, Bleecker Van Waggenen, and Edward H. Dodd, in the sum of one thousand two hundred and forty-nine dollars and ninety-eight cents, said indebtedness consisting of a demand for goods, wares, and merchandise theretofore sold and delivered by said defendants to said D. D. Merrill Company.

That on the 12th day of August, 1893, the said D. D. Merrill Company was justly indebted to Alfred Mudge and Sons, a copartnership residing and doing business in the city of Boston, in the State of Massachusetts, in the sum of one hundred and
3 twenty-six dollars and eighty cents; which said indebtedness was thereafter, on or about March 1, 1894, duly assigned and transferred to the above-named defendants in error, making the total indebtedness of the said D. D. Merrill Company to the defendants in error amount to the sum of one thousand three hundred and seventy-six dollars and seventy-eight cents on or about said first day of March, 1894.

That at all times and dates hereinbefore mentioned the above-named defendants in error, to wit, Frank H. Dodd, Bleecker Van Waggenen, and Robert H. Dodd, were merchants, doing business at the city of New York, in the State of New York, under the firm name of Dodd, Mead and Company; that said Bleecker Van Waggenen was at all times heretofore mentioned and still is a citizen of the State of New Jersey, and that Frank H. and Robert H. Dodd were at all said times citizens of the State of New York, and that all the persons composing the aforesaid firm of Alfred Mudge and Sons were at all the times heretofore mentioned and still are citizens of the State of Massachusetts.

That on and prior to the 23rd day of September, 1893, the said D. D. Merrill Company was the owner of the personal property heretofore mentioned, consisting of stereotyped and electrotyped plates for making and printing books, and the same was then and thereafter continued to be in the custody and possession of the above-mentioned firm, Alfred Mudge and Sons, at the city of Boston, in the State of Massachusetts, until the same was attached and taken into the possession of the sheriff of the county of Suffolk, in said State of Massachusetts, as hereinafter stated, and that the plaintiff in error herein, The Security Trust Company, never ac-

quired the actual custody or possession of said property or any part thereof.

That the firm of Alfred Mudge and Sons, prior to the 8th day of March, 1894, were informed that the said D. D. Merrill Company had made an assignment for the benefit of its creditors under the laws of the State of Minnesota, and that on or about the 25th day of September, 1893, a notice was personally delivered to said firm of Alfred Mudge and Sons, at their place of business, in said city of Boston, by one George E. Merrill, to the effect that he, Merrill, took possession of the property aforesaid for and in behalf of the Security Trust Company, as assignee of the D. D. Merrill Company.

That on the 8th day of March, 1894, the defendants in error above named, to wit, Frank H. Dodd, Bleecker Van Waggenen, and Robert H. Dodd, commenced an action against said D. D. Merrill Company in the superior court for the county of Suffolk, in the Commonwealth of Massachusetts, upon the indebtedness of said D. D. Merrill Company heretofore described, and on said 8th day of March, 1894, caused a writ of attachment in the usual form to be duly issued out of said court in said suit, directed to the sheriff of said county of Suffolk, in the Commonwealth of Massachusetts, directing and commanding that officer to attach such of the personal property of the said D. D. Merrill Company, the defendant therein, as should be found within his said county, or so much thereof as should be sufficient to satisfy the demand of the plaintiffs in said action, together with their costs and expenses, and to safely keep the same until the final determination of said action; that under and in pursuance of said writ of attachment the said sheriff did, on said March 8, 1894, duly attach and take into his possession as the property of said D. D. Merrill Company the personal property hereinbefore described, then in possession of Alfred Mudge and Sons; that the summons in said action was duly served by publication in the manner prescribed by the statutes of the State of Massachusetts, and there was no personal service thereof upon the said D. D. Merrill Company, but the plaintiff in error herein, The Security Trust Company, was informed of the bringing and pendency of said suit by attachment and of the seizure of the property above mentioned prior to the entry of a judgment in said action.

That on the 6th day of August, 1894, a judgment was duly rendered in the suit last above mentioned in favor of the defendants in error herein against said D. D. Merrill Company for the sum of one thousand four hundred and sixty-two dollars and thirty-eight cents damages and forty-seven dollars and forty-one cents costs; and thereupon, on said last mentioned date, an execution in due form was issued out of said court upon said judgment, directed to the sheriff of Suffolk county, in the Commonwealth of Massachusetts, commanding and directing that officer to satisfy the judgment out of the personal property of the said D. D. Merrill Company so, as aforesaid, held by him under said writ of attachment, and to return said execution to said court with a report

of his proceedings thereunder, in the manner provided by law; and that in obedience to said execution the said sheriff did thereupon levy said execution upon the personal property hereinbefore described, and duly advertised said property for sale under the provisions of the laws of the State of Massachusetts, at a time and place duly specified in said notice; that on the 27th day of September, 1894, said property was duly offered for sale at public auction, at the city of Boston, in the State of Massachusetts, and the same was thereupon sold, pursuant to the directions contained in the aforesaid execution, by the sheriff of Suffolk county, in the Commonwealth of Massachusetts, to the defendants in error herein, who were the execution creditors, for the sum of one thousand dollars, and said execution was thereafter duly returned satisfied by said sheriff to the extent of nine hundred and fifty-nine dollars.

That the deed of assignment executed by the D. D. Merrill Company to the plaintiff in error herein, The Security Trust Company, was in the following form, to wit:

"This indenture, made this 23rd day of September, A. D. 1893, between D. D. Merrill Company a corporation, party of the first part, and the Security Trust Company, a corporation created and existing under the laws of the State of Minnesota, and having its principal place of business in the county of Ramsey and State of Minnesota, party of the second part.

"Whereas, said party of the first part is justly indebted to divers and sundry persons in considerable sums of money, and by reason of losses and misfortunes has become, and now is solvent, and is desirous of making a fair and equitable distribution of its property and effects among its creditors, according to law and the statutes in such cases made and provided.

"Now therefore, this indenture witnesseth, that the party of the first part, in consideration of the premises and the sum of one
6 dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged hath granted, bargained, sold, conveyed, transferred, set over and assigned, and by these presents does grant, bargain, sell, convey, transfer, set over, assign and deliver unto the said Security Trust Company, party of the second part its successors and assigns, all the lands, tenements, hereditaments, appurtenances, goods, chattels, choses in action, claims, demands, property and effects belonging to the party of the first part, wherever the same may be situated, and of whatever name or nature, except such property as is exempt from attachment or sale on execution.

"To have and to hold the same, and every part and parcel thereof with the appurtenances, unto the said party of the second part, its successors and assigns.

"In trust nevertheless, that the said Security Trust Company shall forthwith take possession of the said premises, property and effects hereby assigned, and shall sell and dispose of the same with all reasonable diligence and convert the same into money, and also collect all such debts and demands hereby assigned, as may be col-

lectible and with and out of the proceeds of such sales and collection shall

"First. Pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, including the reasonable and lawful compensation of the party of the second part for its services in executing the said trust ;

"Second. Pay and discharge in the order and precedence provided by law, all the debts and liabilities now due or to become due from said party of first part, together with all interest due and to become due thereon, to all its creditors who shall file releases of their debts and claims against said party of the first part, according to chapter one hundred and forty-eight of the General Laws of the State of Minnesota, for the Year 1881, and the several laws amendatory and supplementary thereof, and if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend to the payment of
 7 said debts and liabilities and interest, proportionately on their respective amounts, according to law and the statute in such cases made and provided, and if after the payment of all the costs, charges and expenses attending the execution of said trust and the payment and discharge in full of all the said debts of the said party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then,

"Third. Repay such surplus to the party of the first part its successors and assigns.

"And for the more effectual execution of the trust hereby created, the party of the first part does hereby make, constitute and appoint the party of the second part its true and lawful attorney irrevocable, with full power and authority to do and perform all acts, deeds, matters and things which may be necessary to the full execution of said trust, and for the purpose of said trust to ask, demand, recover and receive of and from all and every person or persons, all the property, debts and demands belonging to the party of the first part, and to give acquittances for the same, and to sue, prosecute, defend and implead for the same, and to execute, acknowledge and deliver all deeds and instruments of conveyance necessary and proper for the better execution of said trust.

"In testimony whereof the said insolvent
 [CORPORATE SEAL.] has caused these presents to be signed by its president and secretary and its corporate seal to be hereunto affixed this 23rd day of September, A. D. 1893.

"D. D. MERRILL COMPANY,

"By D. D. MERRILL, *President*,

"By LEAVITT K. MERRILL, *Secretary*."

That said deed of assignment was further duly acknowledged in the mode prescribed by the laws of the State of Minnesota under and by virtue of which it purported to have been executed.

And the said United States circuit court of appeals further certifies that to the end that it may properly decide the questions

arising in said cause and presented by the record and assignment of errors herein said court desires the instruction of the Supreme Court upon the following questions and propositions of law arising upon said record, to wit :

8 First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualification as assignee thereunder vest said assignee with the title to the personal property aforesaid then located in the State of Massachusetts and in the custody and possession of said Alfred Mudge and Sons.

Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid, to Alfred Mudge and Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the superior court of Suffolk county, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the State of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim.

In witness whereof the undersigned judges, holding the said United States circuit court of appeals for the eighth circuit, have hereunto set their hands this eleventh day of October, A. D. 1897, at St. Paul, Minnesota, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals and by the clerk of said court duly forwarded to the Supreme Court of the United States.

WALTER H. SANBORN,
Circuit Judge.

AMOS M. THAYER,
Circuit Judge.

9 United States Circuit Court of Appeals for the Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of the Security Trust Company, as assignee of the D. D. Merrill Company, plaintiff in error, vs. Frank H. Dodd, Bleeker Van Waggenen, and Edward H. Dodd, copartners as Dodd, Mead and Company, No. 916, May term, 1897, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals,
Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States circuit court of appeals for the eighth circuit, at the city of St. Paul, Minnesota, this eleventh day of October, A. D. 1897.

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of Appeals
for the Eighth Circuit.*

[Endorsed:] U. S. circuit court of appeals, eighth circuit, May term, 1897. No. 916. The Security Trust Company, assignee, etc., pl'ff in error, vs. Frank H. Dodd *et al.* Certificate of questions to Supreme Court of the United States. Filed Oct. 11, 1897. John D. Jordan, clerk.

Endorsed on cover: Case No. 16,708. U. S. C. C. of appeals, 8th circuit. Term No., 188. The Security Trust Company, as assignee of the D. D. Merrill Company, plaintiff in error, vs. Frank H. Dodd, Bleecker Van Wageningen, & Edward H. Dodd, copartners as Dodd, Mead & Company. (Certificate.) Filed October 25th, 1897.